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ANIPLEX, INCORPORATED

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANIPLEX, INCORPORATED, a Japanese  
corporation,

Plaintiff and Counter-Defendant,

v.

THE UPPER DECK COMPANY, a Nevada  
corporation,

Defendant and Counter-Claimant.

CASE NO. 2:08-cv-00442-HDM-PAL

**DECLARATION OF JOSHUA J. POLLACK IN SUPPORT OF PLAINTIFF AND  
COUNTER-DEFENDANT ANIPLEX, INCORPORATED'S OPPOSITION TO  
DEFENDANT AND COUNTER-CLAIMANT THE UPPER DECK COMPANY'S  
MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY  
ADJUDICATION OF ISSUES**

**DECLARATION OF JOSHUA J. POLLACK**

I, Joshua J. Pollack, declare as follows:

1. I am an attorney at law and an associate employed by Proskauer Rose LLP, counsel for Plaintiff and Counter-Defendant Aniplex, Incorporated (“Aniplex”) in this matter. I submit this declaration in support of Aniplex’s Opposition to Defendant and Counter-Claimant The Upper Deck Company’s (“Upper Deck”) Motion For Summary Judgment Or, In The Alternative, Motion For Summary Adjudication Of Issues (“Motion”). I make this declaration of my own personal knowledge except where otherwise stated, and, if called upon to do so, I could and would testify competently to the matters set forth below.

2. Attached hereto as Exhibit 1 is a true and correct copy of cited excerpts from the certified transcript of the deposition of Akira Shinohara, which was taken on February 5, 2009 (the “Shinohara Deposition”). I was present at the Shinohara Deposition. The attached excerpts from this deposition accurately reflect the questions asked and the answers that Mr. Shinohara gave in response thereto.

3. Attached hereto as Exhibit 2 is a true and correct copy of cited excerpts from the certified transcript of the deposition of Eiichi Kamagata, which was taken on May 20, 2009 (the “Kamagata Deposition”). I was present at the Kamagata Deposition. The attached excerpts from this deposition accurately reflect the questions asked and the answers that Mr. Kamagata gave in response thereto.

4. Attached hereto as Exhibit 3 is a true and correct copy of cited excerpts from the certified transcript of the deposition of John Sepenuk, which was taken on January 26, 2010 (the “Sepenuk Deposition”). I was present at the Sepenuk Deposition. The attached excerpts from this deposition accurately reflect the questions asked and the answers that Mr. Sepenuk gave in response thereto.

5. Attached hereto as Exhibit 4 is a true and correct copy of cited excerpts from the certified transcript of the deposition of Asa Suehira-Weintraub, which was taken on February 11, 2010 (the “Suehira Deposition”). I was present at the Suehira Deposition. The attached excerpts

from this deposition accurately reflect the questions asked and the answers that Mr. Suehira-Weintraub gave in response thereto.

6. Attached hereto as Exhibit 5 is a true and correct copy of cited excerpts from the certified transcript of the deposition of Jerry Bennington, which was taken on February 24, 2010 (the “Bennington Deposition”). I was present at the Bennington Deposition. The attached excerpts from this deposition accurately reflect the questions asked and the answers that Mr. Bennington gave in response thereto.

7. Attached hereto as Exhibit 6 is a true and correct copy of cited excerpts from the certified transcript of the deposition of Naritoshi Sato, which was taken on March 2 and 3, 2010 (the “Sato Deposition”). I was present at the Sato Deposition. The attached excerpts from this deposition accurately reflect the questions asked and the answers that Mr. Sato gave in response thereto.

8. Attached hereto as Exhibit 7 is a true and correct copy of cited excerpts from the certified transcript of the deposition of Shuko Yokoyama, which was taken on April 12 and 13, 2010 (the “Yokoyama Deposition”). I was present at the Yokoyama Deposition. The attached excerpts from this deposition accurately reflect the questions asked and the answers that Ms. Yokoyama gave in response thereto.

9. Attached hereto as Exhibit 8 is a true and correct copy of cited excerpts from the certified transcript of the deposition of Hideo Katsumata, which was taken on April 20 and 21, 2010 (the “Katsumata Deposition”). I was present at the Katsumata Deposition. The attached excerpts from this deposition accurately reflect the questions asked and the answers that Mr. Katsumata gave in response thereto.

10. Attached hereto as Exhibit 9 is a true and correct copy of cited excerpts from the certified transcript of the deposition of Kenichi Oshima, which was taken on May 3, 4 and 5, 2010 (the “Oshima Deposition”). I was present at the Oshima Deposition. The attached excerpts from this deposition accurately reflect the questions asked and the answers that Mr. Oshima gave in response thereto.

11. Attached hereto as Exhibit 10 is a true and correct copy of cited excerpts from the certified transcript of the deposition of Keiko Nobuoka, which was taken on May 11 and 12, 2010 (the “Nobuoka Deposition”). I was present at the Nobuoka Deposition. The attached excerpts from this deposition accurately reflect the questions asked and the answers that Ms. Nobuoka gave in response thereto.

12. Attached hereto as Exhibit 11 is a true and correct copy of cited excerpts from the certified transcript of the deposition of Jun Tanaka, which was taken on May 25 and 26, 2010 (the “Tanaka Deposition”). I was present at the Tanaka Deposition. The attached excerpts from this deposition accurately reflect the questions asked and the answers that Mr. Tanaka gave in response thereto.

13. Attached hereto as Exhibit 12 is a true and correct copy of cited excerpts from the certified transcript of the deposition of Koichiro Natsume, which was taken on June 2 and 3, 2010 (the “Natsume Deposition”). I was present at the Natsume Deposition. The attached excerpts from this deposition accurately reflect the questions asked and the answers that Mr. Natsume gave in response thereto.

14. Attached hereto as Exhibit 13 is a true and correct copy of cited excerpts from the certified transcript of the deposition of Omeed Dariani, which was taken on June 17, 2010 (the “Dariani Deposition”). I was present at the Dariani Deposition. The attached excerpts from this deposition accurately reflect the questions asked and the answers that Mr. Dariani gave in response thereto.

15. Attached hereto as Exhibit 14 is a true and correct copy of cited excerpts from the certified transcript of the deposition of Richard McWilliam, which was taken on June 23, 2010 (the “McWilliam Deposition”). I was present at the McWilliam Deposition. The attached excerpts from this deposition accurately reflect the questions asked and the answers that Mr. McWilliam gave in response thereto.

16. Attached hereto as Exhibit 15 is a true and correct copy of cited excerpts from the certified transcript of the deposition of Yu Chih (“Alex”) Yeh, which was taken on June 24, 2010

(the “Yeh Deposition”). I was present at the Yeh Deposition. The attached excerpts from this deposition accurately reflect the questions asked and the answers that Mr. Yeh gave in response thereto.

17. Attached hereto as Exhibit 16 is a true and correct copy of cited excerpts from the certified transcript of the deposition of Rajiv Gokhale, which was taken on June 30, 2010 (the “Gokhale Deposition”). I was present at the Gokhale Deposition. The attached excerpts from this deposition accurately reflect the questions asked and the answers that Mr. Gokhale gave in response thereto.

18. Attached hereto as Exhibit 17 is a true and correct copy of cited excerpts from the certified transcript of the deposition of Masaki Kaifu, which was taken on July 6 and 7, 2010 (the “Kaifu Deposition”). I am informed and believe that the attached excerpts from this deposition accurately reflect the questions asked and the answers that Mr. Kaifu gave in response thereto.

19. Attached hereto as Exhibit 18 is a true and correct copy of Hiroyuki Miwa’s Supplemental Responses to Deposition on Written Questions, dated July 29, 2010. Pursuant to the Stipulated Order Regarding Use of Hiroyuki Miwa’s Responses and Supplemental Responses to Deposition on Written Questions, filed July 30, 2010 (Dkt. #114), Mr. Miwa’s Supplemental Responses may be used in connection with motions for summary judgment or summary adjudication in this case.

20. Attached hereto as Exhibit 19 is a true and correct copy of a letter from Hiroko Haino to John Sepenuk and others, dated December 25, 2003, and Bates-stamped UD002304-2305. The document was marked at the Bennington Deposition as Exhibit 8 and authenticated at the Bennington Deposition (see Exhibit 5 at 86:12-23).

21. Attached hereto as Exhibit 20 is a true and correct copy of an e-mail from John Sepenuk to Richard Privman and Jerry Bennington, dated January 28, 2004, and Bates-stamped UD0042264. The document was marked at the Bennington Deposition as Exhibit 11 and authenticated at the Bennington Deposition (see Exhibit 5 at 98:11-21).

22. Attached hereto as Exhibit 21 is a true and correct copy of a Memo on the Kiba

Situation from John Sepenuk and Swimmy Minami to Jerry Bennington, dated April 2, 2004, and Bates-stamped UD002312-2314. The document was marked at the Bennington Deposition as Exhibit 12 and authenticated at the Bennington Deposition (see Exhibit 5 at 100:22-101:10).

23. Attached hereto as Exhibit 22 is a true and correct copy of an e-mail and attachment from John Sepenuk to Reid Middleton and Josh Grode, dated November 29, 2004, and Bates-stamped UD043978-43981. The document was marked at the Bennington Deposition as Exhibit 13 and authenticated at the Bennington Deposition (see Exhibit 5 at 112:7-14).

24. Attached hereto as Exhibit 23 is a true and correct copy of an Agreement of Commissioning Production Services between Aniplex and Madhouse, dated January 1, 2005, and Bates-stamped ANX030029-30036 (with certified English translation). The document was marked at the Suehira Deposition as Exhibit 2 and authenticated at the Katsumata Deposition (see Exhibit 8 at 59:16-18)

25. Attached hereto as Exhibit 24 is a true and correct copy of an e-mail from Paul Swanson to Asa Suehira and others, dated April 14, 2005, and Bates-stamped UD019594-19612. The document was marked at the Suehira Deposition as Exhibit 5 and authenticated at the Suehira Deposition (see Exhibit 4 at 77:14-78:9).

26. Attached hereto as Exhibit 25 is a true and correct copy of an e-mail thread between Asa Suehira, John Sepenuk and others, dated October 4, 2005, and Bates-stamped UD015689-15692. The document was marked at the Suehira Deposition as Exhibit 15 and authenticated at the Suehira Deposition (see Exhibit 4 at 135:12-22).

27. Attached hereto as Exhibit 26 is a true and correct copy of an e-mail thread between Richard McWilliam, John Sepenuk and others, dated December 5, 2005, and Bates-stamped UD067774-67777. The document was marked at the McWilliam Deposition as Exhibit 306 and authenticated at the McWilliam Deposition (see Exhibit 14 at 131:17-132:8).

28. Attached hereto as Exhibit 27 is a true and correct copy of the "Kiba" Short Form Agreement, dated December 10, 2005, and Bates-stamped UD003597-3610. The document was marked at the Bennington Deposition as Exhibit 28 and authenticated at the Bennington

Deposition (see Exhibit 5 at 189:12-25).

29. Attached hereto as Exhibit 28 is a true and correct copy of a letter from Jun Tanaka to Upper Deck, dated August 4, 2006, and Bates-stamped ANX012439-12443. The document was marked at the Tanaka Deposition as Exhibit 151 and authenticated at the Tanaka Deposition (see Exhibit 11 at 87:20-88:17).

30. Attached hereto as Exhibit 29 is a true and correct copy of an e-mail and attachment from Steve Kalt to Jun Tanaka, Asa Suehira and John Sepenuk, dated August 17, 2006, and Bates-stamped ANX012583-12585. The document was marked at the Tanaka Deposition as Exhibit 152 and authenticated at the Tanaka Deposition (see Exhibit 11 at 90:14-91:11).

31. Attached hereto as Exhibit 30 is a true and correct copy of a letter from Jun Tanaka to Upper Deck, dated August 24, 2006, and Bates-stamped ANX012706-12710. The document was marked at the Tanaka Deposition as Exhibit 153 and authenticated at the Tanaka Deposition (see Exhibit 11 at 101:5-22).

32. Attached hereto as Exhibit 31 is a true and correct copy of an e-mail thread between Richard McWilliam, John Sepenuk and others, dated November 7, 2006, and Bates-stamped UD033985-33987. The document was marked at the Sepenuk Deposition as Exhibit 38 and authenticated at the Sepenuk Deposition (see Exhibit 3 at 305:1-15, 122:18-123:4).

33. Attached hereto as Exhibit 32 is a true and correct copy of an e-mail thread between Kenichi Oshima, John Sepenuk and others, dated November 8, 2006, and Bates-stamped UD026560-26561. The document was marked at the Sepenuk Deposition as Exhibit 39 and authenticated at the Sepenuk Deposition (see Exhibit 3 at 306:16-22, 122:18-123:4).

34. Attached hereto as Exhibit 33 is a true and correct copy of an e-mail thread between Yuko Hiroi, Gina Williams, John Sepenuk, and others, dated November 15, 2006, and Bates-stamped UD065159. The document was authenticated at the Sepenuk Deposition (see Exhibit 3 at 122:18-123:4).

35. Attached hereto as Exhibit 34 is a true and correct copy of an e-mail thread

between John Sepenuk, Soichiro “Swimmy” Minami and others, dated November 16, 2006, and Bates-stamped UD025222-25224. The document was authenticated at the Sepenuk Deposition (see Exhibit 3 at 122:18-123:4).

36. Attached hereto as Exhibit 35 is a true and correct copy of an e-mail thread between Yuko Hiroi, Gina Williams, John Sepenuk and others, dated December 12, 2006, and Bates-stamped UD036683. The document was authenticated at the Sepenuk Deposition (see Exhibit 3 at 122:18-123:4).

37. Attached hereto as Exhibit 36 is a true and correct copy of an e-mail from Kenichi Oshima to John Sepenuk, dated December 18, 2006, and Bates-stamped UD019174-19175. The document was marked at the Oshima Deposition as Exhibit 237 and authenticated at the Oshima Deposition (see Exhibit 9 at 273:18-274:5).

38. Attached hereto as Exhibit 37 is a true and correct copy of an e-mail thread between Kenichi Oshima, Jun Tanaka and others, dated December 22, 2006, and Bates-stamped ANX012972-12975 (with certified English translation). The document, which attaches the Amended and Restated “Kiba” Short Form Agreement, was marked at the Oshima Deposition as Exhibit 238 and authenticated at the Oshima Deposition (see Exhibit 9 at 277:11-279:5).

39. Attached hereto as Exhibit 38 is a true and correct copy of an e-mail thread between John Sepenuk, Jun Tanaka and others, dated January 11, 2007, and Bates-stamped ANX013236-13237. The document was marked at the Sepenuk Deposition as Exhibit 37 and authenticated at the Sepenuk Deposition (see Exhibit 3 at 303:2-17, 122:18-123:4).

40. Attached hereto as Exhibit 39 is a true and correct copy of a letter from Jun Tanaka to Upper Deck, dated January 26, 2007, and Bates-stamped ANX013432-13433. The document was marked at the Tanaka Deposition as Exhibit 155 and authenticated at the Tanaka Deposition (see Exhibit 11 at 115:8-24).

41. Attached hereto as Exhibit 40 is a true and correct copy of the Expert Report of Masaki Kaifu Pursuant to Federal Rule of Civil Procedure 26(a)(2)(B), dated April 23, 2010, and Bates-stamped ANX038699-38705. The document was marked at the Kaifu Deposition as



Exhibit 186 and authenticated at the Kaifu Deposition (see Exhibit 17 at 35:20-36:11).

42. Attached hereto as Exhibit 41 is a true and correct copy of a table entitled “Summary of Out-of-Pocket Damage to Upper Deck.” The document was marked at the McWilliam Deposition as Exhibit 311 and is Exhibit C to the Expert Report of Rajiv Gokhale (one of Upper Deck’s proffered experts) dated April 26, 2010. Mr. Gokhale’s Expert Report was marked at the June 28, 2010 Deposition of Thomas Neches as Exhibit 181 and authenticated at the Gokhale Deposition (see Exhibit 16 at 49:24-50:4, 69:21-23).

43. Attached hereto as Exhibit 42 is a chart I assisted in preparing, which summarizes the key differences between the Short Form and the A&R Short Form.

44. On November 3, 2008, Aniplex completed its production of documents pursuant to Fed. R. Civ. P. 26(a), which totaled 34,723 pages. The production included a chronology prepared by Hiroyuki Miwa (Bates-stamped ANX012772-12274) that, among other things, referenced a July 25, 2006 letter from Susumu Matsushita. The chronology was produced to Upper Deck on or about September 29, 2008.

45. Upper Deck served its first (and only) set of document requests on October 12, 2009. Aniplex responded to the document requests, and produced an additional 131 pages of documents, on November 16, 2009. Upper Deck did not raise any issues with Aniplex’s document production until December 28, 2009 when it made the vague assertion in the parties’ Joint Status Report (Dkt. # 96 at p. 7) that “Upper Deck has reason to believe that Aniplex’s production may not be complete and that Aniplex has not produced certain categories of documents.” Upper Deck did not begin the meet and confer process until mid-February, 2010.

46. On April 13 and 14, 2010, Aniplex produced an additional 1,360 pages of documents in response to UD’s document requests.

47. On April 29, 2010, Upper Deck for the first time raised an issue about the Miwa chronology that Aniplex had produced 19 months earlier. On that date, Bennett Bigman, counsel for Upper Deck, sent me an e-mail stating “Josh - In addition to the various agreements and related correspondence, we would want Ms. Nobouka [sic] to be familiar with and discuss with

Mr. Miwa the chronology which is at ANX 012772. In reviewing Aniplex's production, we do not seem to have received various documents referred to in the chronology, including correspondence from Susumu Matshushita [sic] to Aniplex dated on or around July 25, 2006 . . . and Aniplex's response. Please provide us with copies of this correspondence, as well as any other documents referred to in the chronology (or other correspondence among Dream Ranch, Aniplex and/or Matsushita (including SME and/or XENN) that have not already been produced, no later than May 5, 2010."

48. One week later, on May 6, 2010, I produced the requested documents (totaling 14 pages) to Mr. Bigman, including the July 25, 2006 letter.

49. Contrary to Upper Deck's assertion in its Motion (at p. 6 fn. 8 and pp. 16-17), neither I nor any other attorney representing Aniplex "stipulated" that the certified English translation of any Japanese language document (including the Madhouse Agreement) would control over the original Japanese. In support of its assertion, Upper Deck relies solely on an objection that I made during the Suehira Deposition on February 11, 2010. That deposition was the first that made use of certified English translations, and I was unaware at the time of any problems with the translations. Later witnesses testified that the English translation of the Madhouse Agreement is both incorrect and missing important nuances, and were allowed to provide their understanding of the original Japanese. See Katsumata Deposition at 63:6-65:4, 69:23-70:24; Kaifu Depo. at 183:20-184:9, 186:18-187:2, 189:19-190:9, 191:14-192:2, 193:21-194:9, 194:20-195:1, 195:13-196:2, 197:11-16, 197:25-199:5, 203:9-15. Similar issues were raised regarding the certified English translations of other documents, and witnesses were again allowed to provide their understanding of the original Japanese. See Sato Deposition at 128:19-129:6, 130:2-9, 132:19-133:7, 153:5-154:3, 198:3-8, 198:17-199:7; Suehira Deposition at 116:18-117:4, 118:18-25, 162:2-6, 184:23-185:12, 186:19-187:1, 190:6-15, 194:11-19; Yokoyama Deposition at 67:6-17.

50. To the extent there was any existing ambiguity, during the Tanaka Deposition on May 26, 2010, I made clear that I had not stipulated that the certified English translations would

control:

MS. ZELDIN [Upper Deck's counsel]: . . . you have stipulated that whatever Morningside translates it to, that's what it's supposed to be.

MR. POLLACK: That's actually not true.

MS. ZELDIN: I'll find the record where you say it.

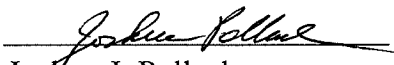
MR. POLLACK: You can find all the records you want. There has been numerous testimony in this case where the translation has not been completely accurate, and you haven't objected when the witness has explained the differences.

Tanaka Deposition at 221:1-11.

51. During the Oshima Deposition, Upper Deck's counsel instructed Mr. Oshima to review the original Japanese of a document that he wrote, instead of the certified English translation. Oshima Deposition at 282:5-16.

52. During the Kaifu deposition, Upper Deck's counsel acknowledged that there were "material errors" with some of the certified English translations, and agreed that "we don't need to look at the translation." Kaifu Deposition at 157:16-158:19, 164:14-165:5.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I executed this declaration this 27<sup>th</sup> day of August, 2010 in Los Angeles, California.

  
Joshua J. Pollack

**CERTIFICATE OF SERVICE**

Pursuant to Federal Rule of Civil Procedure 5, I hereby certify that I am a member of Proskauer Rose LLP, and that I caused a true and correct copy of the foregoing

**DECLARATION OF JOSHUA J. POLLACK IN SUPPORT OF PLAINTIFF AND COUNTER-DEFENDANT ANIPLEX, INCORPORATED'S OPPOSITION TO DEFENDANT AND COUNTER-CLAIMANT THE UPPER DECK COMPANY'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES** to be served on the parties in this action through the Federal Court CM/ECF system.

DATED this 27th day of August, 2010

/s/ Joshua J. Pollack

An associate with Proskauer Rose LLP, *admitted pro hac vice*